

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

DAVID LANE JOHNSON,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION, ET AL.,

Defendants.

Civil Action No. 1:17-cv-05131-RJS

**DEFENDANT NFLPA’S RULE 56.1 STATEMENT OF
UNDISPUTED MATERIAL FACTS IN SUPPORT OF
ITS MOTION FOR SUMMARY JUDGMENT**

Defendant National Football League Players Association (“NFLPA” or “Union”), pursuant to Local Civil Rule 56.1, hereby submits this Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment against Plaintiff David Lane Johnson’s (“Johnson” or “Plaintiff”) Labor Management Reporting and Disclosure Act (“LMRDA”) claim, brought under 29 U.S.C. § 414.

I. THE NFLPA’S OCTOBER 16, 2018 PRODUCTION OF DOCUMENTS

1. On October 16, 2018, the NFLPA produced to Johnson a complete copy of the 2015 Performance-Enhancing Substances Policy (“2015 Policy”) and all agreements thereunder (including side letters and modifications to the 2015 Policy). *See* Declaration of Stephen M. Saxon (“Saxon Decl.”) ¶¶ 3-5.

2. The production of documents on October 16, 2018 included:

i. A complete copy of the 2015 Policy;

- ii. A letter dated April 22, 2013 from Dennis Curran to Tom DePaso memorializing the NFL and NFLPA's agreement that all NFL players and prospective players shall be required to execute medical record authorization forms as part of each player's pre-employment physical examination;
- iii. A letter dated May 7, 2015 from Adolpho Birch to Tom DePaso modifying the 2014 Policy on Performance-Enhancing Substances to provide that the Directors of the UCLA Olympic Analytical Laboratory and the Sports Medicine Research and Testing Laboratory may fulfill the responsibilities of the Chief Forensic Toxicologist ("CFT") and that "all other responsibilities of the [CFT] as set forth in the Policy shall not be in effect" "[u]ntil such time as the Parties jointly select a new [CFT] to replace Dr. Bryan Finkle;" and
- iv. Screen shots of player certifications regarding drug testing. *See* Saxon Decl. ¶ 4; Exhibits A-1 through A-8 to the Declaration of David L. Greenspan ("Greenspan Decl.").

3. The NFLPA stated in its October 16, 2018 letter that it made certain that all documents relevant to the 2015 Policy were included by erring on the side of over-inclusiveness with the document production. *See* Exhibit A-1 to Greenspan Decl., at 4.

II. THE NFLPA HAS PRODUCED TO JOHNSON ALL DOCUMENTS RELATING TO THE 2015 POLICY

4. "In late 2016/early 2017, the NFLPA asked [its labor counsel, Stephen Saxon,] to review and identify documents that could be subject to disclosure under the [LMRDA] with respect to the 2015 NFL-NFLPA Collective Bargaining Agreement." Saxon Decl. ¶ 2.

5. "The NFLPA's October 16, 2018 production to Plaintiff David Lane Johnson consists of a subset of the identified documents that [Mr. Saxon] had reviewed, specifically, those

documents relating to the [2015 Policy].” Saxon Decl. ¶ 3.

6. As stated in his Declaration, Mr. Saxon is “not aware of—and do[es] not believe that there are—any other documents relating to the 2015 Policy that Mr. Johnson has not received that the NFLPA would be required to produce even if Mr. Johnson were to prevail on his LMRDA claim. For example, [he is] not aware of any—and understand[s] there is no—side agreement relating to the bargaining parties’ interpretation of the timeline for reasonable-cause testing, as Mr. Johnson has alleged.” Saxon Decl. ¶ 5.

7. Heather McPhee, the NFLPA’s Associate General Counsel, also attested that she is “not aware of—and do[es] not believe there were any—oral agreements between the NFLPA and the NFL to modify the 2015 Policy.” Declaration of Heather McPhee ¶ 2.

8. The NFLPA has produced—to *Johnson, in this case*—an agreement with the NFL (dated December 1, 2016) appointing Arbitrator Shyam Das to serve as the *third* neutral arbitrator for applicable appeals under the Performance-Enhancing Substances Policy (“PES Policy”) and Policy and Program on Substances of Abuse to Johnson on October 25, 2017. *See* Ex. F to Opp’n to Pl.’s Mot. to Vacate An Arb. Award (Oct. 25, 2017), ECF No. 113-6.

9. Arbitrator Carter held in the October 11, 2016 Arbitral Award that the interpretation of the timeline for reasonable cause testing was subject to Dr. Lombardo’s discretion—not any agreement to modify the 2015 Policy between the NFL and NFLPA. Arb. Award ¶ 6.15, 6.19, ECF No. 39-2; Arb. Hr’g Tr. 170:4-171:20, ECF No. 3-10.

10. With respect to UCLA’s collection procedures and laboratory protocols, Arbitrator Carter held that “[t]hese descriptions of procedures are summaries of laboratory operating procedures” and not any collectively-bargained agreement between the NFL and NFLPA. Arb. Award ¶ 6.38, ECF No. 39-2. Arbitrator Carter also declined to order the NFL to produce these

documents during the arbitration. Arb. Award ¶¶ 6.39-6.42, ECF No. 39-2.

11. The NFLPA has produced the 2015 Policy amendment regarding the CFT to Johnson—twice. *See* Ex. I to Opp’n to Pl.’s Mot. to Vacate An Arb. Award (Oct. 25, 2017), ECF No. 113-9; Exhibit A-7 to Greenspan Decl.

Dated: New York, New York
November 9, 2018

Respectfully submitted,

s/ Jeffrey L. Kessler

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